

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HARVEY EUGENE MURPHY, JR.,

Plaintiff,

v.

ESSILORLUXOTTICA USA INC.,
LUXOTTICA OF AMERICA INC.,
LUXOTTICA RETAIL NORTH
AMERICA INC., MACY’S, INC.,
KIMCO REALTY CORPORATION,
THOMAS STITES, GREYSI NAYELI
RODRIGUEZ BONILLA, and
ANTHONY PFLEGER,

Defendants.

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C.A. NO. 4:24-cv-00801
(Removed from the 125th Judicial
District Court of Harris County,
Texas, Cause No. 2024-03265)

**DEFENDANTS’ SUR REPLY IN OPPOSITION TO
PLAINTIFF’S MOTION TO REMAND**

Defendants, EssilorLuxottica USA Inc., Luxottica of America Inc. f/k/a Luxottica Retail North America Inc., Thomas Stites (“Stites”), Greysi Nayeli Rodriguez Bonilla (“Rodriguez”), and Anthony Pfleger (“Pfleger”) (collectively, “Defendants”) file this Sur-Reply in opposition to Plaintiff Harvey Eugene Murphy, Jr.’s (“Plaintiff’s”) Motion to Remand (Dkt. 17) (“Motion”) and would show:

1. Defendants will not reargue legal or factual points previously made in their Response, but rather, file this Sur Reply to address two erroneous arguments made in Plaintiff’s May 23, 2024 Reply Brief:

- a. First, Plaintiff mistakenly urged the Court to conduct its Rule 12(b)(6)-type analysis under *Smallwood* using the Texas fair-notice pleading

standard.¹ The cases that Plaintiff cited, however, all have been overruled by the Fifth Circuit. The Court in *International Energy Ventures Management, L.L.C. v. United Energy Group, Ltd.*, 818 F.3d 193, 208 (5th Cir. 2016), held unequivocally that “[a] federal court must apply the federal pleading standard” when conducting a *Smallwood* analysis. *Id.* (emphasis added). It is indisputable that the Court should analyze Plaintiff’s improper joinder of Stites and Rodriguez using the federal pleading standards set forth in *Twombly* and *Iqbal*.

- b. Second, Defendants did not ignore any “withholding material information” component of the relevant analysis. In that context, Plaintiff’s pleadings must allege facts showing that any alleged withholding by Rodriguez was “deliberate” and related to a material/exculpatory fact—this is equivalent to the “knowing” element discussed in the Response. That Rodriguez’s conduct was “knowing” and/or any alleged failure to disclose was deliberate and concerned a material exculpatory fact is precisely what is entirely missing from Plaintiff’s pleadings. Plaintiff’s own response confirms this essential element:²

• **Malice:** “[T]endering false information, or deliberately concealing or deliberately failing to disclose exculpatory information, can give rise to an inference that the defendant acted with malice in initiating or maintaining a prosecution.” *Lewis v. Cont’l Airlines, Inc.*, 80 F. Supp. 2d 686, 700 (S.D. Tex. 1999); *Martin v. Thomas*, 973 F.2d 449, 457 (5th Cir.1992).

¹ Reply at 5-8.

² *Id.* at 3. Plaintiff’s pleadings contain no allegations of any “deliberate” failure to disclose by Rodriguez, much less any allegations relating to a material exculpatory fact. Again, Plaintiff attempts through his Motion and Reply to add allegations not included in his Petition. Plaintiff alleges only that Rodriguez failed to disclose that she spoke to EssilorLuxocitta’s loss prevention personnel prior to the line-up—not that this was a deliberate or knowing failure, a knowingly misidentification of Plaintiff, or that what she supposedly discussed was material or exculpatory in any way. This “knowing” and “deliberate” element so necessary to these particular causes of action is entirely absent from Plaintiff’s pleadings against Rodriguez and Stites.

As Defendants stated in their Response, Plaintiff's failure to plead "knowing" or "deliberate" conduct as well as the other necessary elements entirely precludes him from proving a malicious prosecution or false imprisonment claim against Rodriguez in state court, and there is no general negligence claim available in this context.

Dated: May 31, 2024

Respectfully submitted,

/s/ Susan L. Bickley

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CERTIFICATE OF SERVICE

I certify that on May 31, 2024, a true and correct copy of the foregoing instrument was served upon the following counsel in compliance with the Federal Rules of Civil Procedure:

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